

A Tenaga Nasional Bhd v Ahmad Zaki Resources Bhd

B HIGH COURT (KUALA LUMPUR) — SUIT NO S2–22–87 OF 2008
ROSILAH YOP JC
30 JANUARY 2013

C *Civil Procedure — Action — Cause of action — Compensation for damage — Plaintiff's electrical installation damaged by construction works carried out by defendants' contractor — Whether plaintiff's action to recover compensation for consequential losses established — Whether plaintiff had locus standi to bring claim — Whether strict liability imposed upon defendants by s 41 of the Electricity Supply Act 1990*

D *Public Utilities — Electricity — Compensation for damage — Damage to electrical installation — Plaintiff's underground cables damaged by construction works carried out by defendants' contractor — Whether defendant notified of existence of cable underground — Vicariously liability not pleaded — Whether defendant having sole control over project site — Whether res ipsa loquitor applicable — Whether duty of care established — Whether plaintiff had locus standi to bring claim — Whether strict liability imposed upon defendants by s 41 of the Electricity Supply Act 1990*

E *Tort — Negligence — Duty of care — Plaintiff's electrical installation damaged by construction works carried out by defendants' contractor — Whether defendant notified of existence of cable underground — Vicariously liability not pleaded — Whether defendant having sole control over project site — Whether res ipsa loquitor applicable — Whether duty of care owed by defendant to plaintiff*

F *Tort — Negligence — Electricity supplier — Plaintiff's electrical installation damaged by construction works carried out by defendants' contractor — Whether defendant notified of existence of cable underground — Vicariously liability not pleaded — Whether defendant having sole control over project site — Whether res ipsa loquitor not applicable — Whether duty of care established*

G *Tort — Negligence — Electricity supplier — Plaintiff's electrical installation damaged by construction works carried out by defendants' contractor — Whether defendant notified of existence of cable underground — Vicariously liability not pleaded — Whether defendant having sole control over project site — Whether res ipsa loquitor not applicable — Whether duty of care established*

H The defendant was involved in the construction of a highway project ('the project'). Before the commencement of the said project, several meetings were held with regards to the location of 33kV cables owned by the plaintiff located underground at the project site. The location of the cable was not marked in the plan given to the defendant. The plaintiff claimed that during several

meetings, the plaintiff had verbally informed the defendant through its employees or representatives the location of the cable. The plaintiff's cable was damaged while the piling of sheet piles were being carried out by the defendant's subcontractor, Giga Engineering Sdn Bhd ('Giga'). The plaintiff thus claimed for the losses it had suffered as a result of the damage to the cable. The defendant alleged that TN Distribution was in charge of the project and at all material time the defendant was dealing with TN Distribution. TN Distribution had returned the duly approved plan which was marked with the route of the 33kV cable but did not indicate on the approved plan the presence of any 33kV cable at the point of damage. Apart from the tort of negligence, the plaintiff also relied on s 41 of the Electricity Supply Act 1990 ('the Act'). The plaintiff also pleaded and relied on the maxim of *res ipsa loquitur* on the grounds that the defendant had control over the location of the site at material time and therefore bore the burden to show that the defendant was not negligent in carrying out the sheet piling work. The defendant denied any negligence on its part for the damage caused to the cable. The issue arising for determination was whether the defendant had knowledge of the presence or existence of the cable at the damage point. The defendant claimed that the plaintiff did not have the locus standi to bring this suit against the defendant because TN Distribution was a separate entity from the plaintiff and the damage to the cable was caused by Giga. The plaintiff however submitted that the issue of locus standi was not pleaded by the defendant in its defence.

Held, dismissing the plaintiff's claim with costs:

- (1) The plaintiff claimed that they had marked the route of 33kV cable in the plan. The burden therefore was on the plaintiff to prove that by producing a copy of that Plan at the trial. The Plan was never produced by the plaintiff at the trial. In fact the plaintiff failed to produce a single plan or drawing that showed the existence of the 33kV cable at the point of damage. The plaintiff owed a duty to dispel the allegation that it did the marking on the plan, by producing the said plan. Hence, s 114(g) of the Evidence Act 1950 was invoked against the plaintiff to hold that if the plaintiff had produced the said plan which PW1 alleged he had marked the route of 33kV cable at the point of damage; his evidence would have been unfavorable to the plaintiff (see paras 29–30 & 32); *Juahir bin Sadikon v Perbadanan Kemajuan Ekonomi Negeri Johor* [1996] 3 MLJ 627 referred.
- (2) The drawings produced at trial did not show the presence or existence of the 33kV cable at the point of damage. The plaintiff had admitted the authenticity and accuracy of the construction plan. Thus, the contents of the construction drawing were the evidence accepted by the court. There was no 33kV cable marked at the point of damage (see paras 33–34).
- (3) The evidence of the plaintiff's own witness confirmed that no written

- A notice was given by the plaintiff to the defendant for the existence of the 33kV cable at the point of damage (see para 41).
- (4) The plaintiff had actual knowledge that the sheet piling work was undertaken by Giga and not the defendant. It was not pleaded that the defendant was vicariously liable for the acts or omissions of its sub contractor. Pursuant to s 41 of the Act, the person who damages any installation shall be liable to compensate for the damage he has done. The provision places strict liability on the party who damaged the installation. It was evident that Giga damaged the cable and not the defendant. Hence, the plaintiff was not entitled to claim for any compensation for the damage caused to the cable under s 41 of the Act (see paras 59–61).
- (5) There was no evidence that the defendant had sole control over the location of the site. The evidence showed that Giga also had control over the location of the site. Therefore, the incident itself was not sufficient evidence of negligence on the part of the defendant. The cause of event leading to the damage was not only under the control of the defendant but also Giga. The defendant clearly shown that the damage was caused by sheet piling works undertaken by Giga and not the defendant. In the circumstances, the maxim of *res ipsa loquitur* did not apply in this case (see paras 63 & 65).
- (6) Although the issue of locus standi was not pleaded, there was no prejudice and surprise caused to the plaintiff. The plaintiff had wrongly sued the defendant, therefore the plaintiff's claim could not be allowed by the court. The plaintiff did not have the locus standi to bring this suit against the defendant because the TN Distribution was a separate entity from the plaintiff and the damage to cable was caused by Giga. The defendant had not breach any duty of care owed to the plaintiff (see paras 71–73).

G **[Bahasa Malaysia summary]**

- Defendan terlibat dalam pembinaan projek lebuh raya ('projek'). Sebelum projek tersebut bermula, beberapa perjumpaan diadakan mengenai lokasi kabel-kabel 33kV yang dimiliki oleh plaintif yang berada di bawah tanah di tapak projek tersebut. Lokasi kabel-kabel tersebut tidak ditandakan di dalam pelan yang diberikan kepada defendan. Plaintif mendakwa bahawa dalam beberapa perjumpaan, plaintif telah memaklumkan defendan secara lisan menerusi pekerja-pekerja atau wakil-wakilnya mengenai lokasi kabel tersebut. Kabel plaintif telah rosak semasa pencerucukan cerucuk-cerucuk lembaran yang dijalankan oleh subkontraktor defendan, Giga Engineering Sdn Bhd ('Giga'). Oleh itu plaintif menuntut untuk kerugian yang dialaminya akibat kerosakan kepada kabel tersebut. Defendan mendakwa bahawa TN Distribution bertanggungjawab ke atas projek dan pada semua masa material defendan berurusan dengan TN Distribution. TN Distribution telah

memulangkan pelan yang diluluskan yang ditandakan dengan laluan kabel 33kV tetapi tidak dinyatakan ke atas pelan yang diluluskan mengenai kewujudan mana-mana kabel 33kV pada masa kerosakan. Selain daripada tort kecuai, plaintif juga bergantung kepada s 41 Akta Bekalan Elektrik 1990 ('Akta'). Plaintif juga memplid dan bergantung kepada maksim *res ipsa loquitor* atas alasan bahawa defendan mempunyai kawalan terhadap lokasi tapak pada masa material dan oleh itu menanggung beban untuk menunjukkan bahawa defendan tidak cuai dalam menjalankan kerja pencerucukan lembaran. Defendan menafikan sebarang kecuai daripada pihaknya untuk kerosakan yang dibuat ke atas kabel. Isu yang timbul untuk penentuan ialah sama ada defendan mempunyai pengetahuan mengenai kehadiran atau kewujudan kabel pada masa kerosakan. Defendan mendakwa bahawa plaintif tidak mempunyai locus standi untuk mendakwa terhadap defendan kerana Pengedaran TN merupakan entiti yang berasingan daripada plaintif dan kerosakan kepada kabel disebabkan oleh Giga. Plaintif bagaimanapun menghujah bahawa isu locus standi tidak diplidkan oleh defendan dalam pembelaannya.

Diputuskan, menolak tuntutan plaintif dengan kos:

- (1) Plaintif mendakwa bahawa mereka telah menandakan laluan kabel 33kV di dalam pelan. Beban oleh itu terletak ke atas plaintif untuk membuktikannya dengan mengemukakan satu salinan pelan tersebut pada perbicaraan. Pelan tersebut tidak pernah dikemukakan oleh plaintif pada perbicaraan. Malah plaintif gagal untuk mengemukakan satu pelan tunggal atau lakaran yang menunjukkan kewujudan kabel 33kV pada masa kerosakan. Plaintif mempunyai kewajipan untuk menolak dakwaan bahawa dia membuat tanda ke atas pelan dengan mengemukakan pelan tersebut. Oleh itu, s 114(g) Akta Keterangan 1950 digunakan terhadap plaintif untuk memutuskan bahawa sekiranya plaintif telah mengemukakan pelan tersebut di mana PW1 mendakwa dia telah menandakan laluan kabel 33kV pada masa kerosakan, keterangannya tidak akan berpihak kepada plaintif (lihat perenggan 29–30 & 32); *Juahir bin Sadikon v Perbadanan Kemajuan Ekonomi Negeri Johor* [1996] 3 MLJ 627 dirujuk.
- (2) Lakaran-lakaran yang dikemukakan pada perbicaraan tidak menunjukkan kehadiran atau kewujudan kabel 33kV pada masa kerosakan. Plaintif mengakui kesahihan dan ketepatan pelan pembinaan. Oleh itu, isi kandungan lakaran pembinaan merupakan keterangan yang diterima oleh mahkamah. Tidak terdapat kabel 33kV ditandakan pada masa kerosakan (lihat perenggan 33–34).
- (3) Keterangan saksi plaintif sendiri mengesahkan bahawa tiada notis bertulis yang diberikan oleh plaintif kepada defendan mengenai kewujudan kabel 33kV pada masa kerosakan (lihat perenggan 41).

- A (4) Plaintiff mempunyai pengetahuan sebenar bahawa kerja pencerucukan lembaran dijalankan oleh Giga dan bukannya defendan. Tidak diplid bahawa defendan bertanggung secara vikarius untuk tindakan-tindakan atau peninggalan-peninggalan subkontraktornya.
- B Menurut s 41 Akta, orang yang merosakkan sebarang pemasangan seharusnya bertanggung membayar ganti rugi untuk kerosakan yang dilakukannya. Peruntukan tersebut meletakkan liabiliti ketat ke atas pihak yang merosakkan pemasangan. Adalah jelas bahawa Giga merosakkan kabel dan bukannya defendan. Oleh itu, plaintiff tidak berhak untuk menuntut sebarang ganti rugi untuk kerosakan yang dibuat kepada kabel di bawah s 41 Akta (lihat perenggan 59–61).
- C (5) Tiada keterangan bahawa defendan mempunyai kawalan tunggal terhadap lokasi tapak. Keterangan menunjukkan bahawa Giga juga mempunyai kawalan terhadap lokasi tapak. Oleh itu, insiden tersebut bukanlah bukti kecuai yang mencukupi ke atas pihak defendan. Punca kejadian yang membawa kepada kerosakan bukan sahaja di bawah kawalan defendan tetapi juga Giga. Defendan dengan jelas menunjukkan bahawa kerosakan disebabkan kerja pencerucukan lembaran yang dijalankan oleh Giga dan bukannya defendan. Dalam keadaan ini, pepatah *res ipsa loquitur* tidak terpakai dalam kes ini (lihat perenggan 63 & 65).
- D (6) Walaupun isu locus standi tidak diplid, tiada prejudis atau kejutan berlaku kepada plaintiff. Plaintiff tersalah mendakwa defendan, oleh itu tuntutan plaintiff tidak dibenarkan oleh mahkamah. Plaintiff tidak mempunyai locus standi untuk mendakwa defendan kerana TN Distribution merupakan entiti berasingan daripada plaintiff dan kerosakan kepada kabel disebabkan oleh Giga. Defendan tidak melanggar apa-apa kewajipan berhati-hati yang ditanggung oleh mereka kepada plaintiff (lihat perenggan 71–73).]
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- F
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Notes

For a case on electricity supplier, see 12 *Mallal's Digest* (4th Ed, 2011 Reissue) para 1242.

- H For cases on cause of action, see 2(1) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 55–77.

For cases on duty of care, see 12 *Mallal's Digest* (4th Ed, 2011 Reissue) paras 1157–1226.F

I Cases referred to

Juahir bin Sadikon v Perbadanan Kemajuan Ekonomi Negeri Johor [1996] 3 MLJ 627; [1996] 4 CLJ 1, CA (refd)
Tenaga Nasional Bhd v Trans Resources Corp Sdn Bhd & Anor [2009] 5 MLJ 673; [2009] 1 LNS 516, HC (refd)

Teoh Guat Looi v Ng Hong Guan [1998] 4 MLJ 525; [1998] 4 CLJ 416, CA (refd) A

Teoh Meng Keat and Anor v Penny Ann Monomony Dawson [2011] 1 LNS 251, HC (refd)

Wu Siew Ying v Gunung Tungal Quarry and Construction Sdn Bhd & Ors [1999] 4 MLJ 9; [1999] 4 CLJ 339, HC (refd) B

Legislation referred to

Electricity Supply Act 1990 s 41

Evidence Act 1950 ss 103, 114(g) C

Josephine Sui (Harjinder Kaur with her) (Shahrizat Rashid & Lee) for the plaintiff.

Alan Gomez (Rahayu Mumazaini and Anita with him) (Tommy Thomas) for the defendant. D

Rosilah Yop JC:

THE PLAINTIFF'S CASE E

[1] The plaintiff's claim against the defendant is based on the tort of negligence. The defendant was involved in the construction of a highway project that connects Jalan Kewajipan in Subang Jaya to FHR 2, New Klang Expressway and Lebuhraya Damansara Puchong ('the said project'). The defendant was appointed by the Government of Malaysia to construct works on the said project. F

[2] Before the commencement of the said project, the plaintiff and Messrs Maunsell Sharma & Zakaria ('MSZ') had several meetings with regards to the location of the 33kV cables owned and maintained by the plaintiff located underground at the construction site of the project. MSZ was the project consultant for the government. G H

[3] The trial holes were done and at an early digging of the trial hole, the 33kV cable was discovered and the defendant or his agent had full knowledge of it. I

[4] The location of the 33kV cable was not marked in the plan given to the defendant but it was told by the plaintiff to the defendant during the site visit, the existence of the 33kV cable was at the point of the damage.

- A [5] On several meetings and discussions, the plaintiff had verbally informed the defendant through its employees or representatives the location of the 33kV cable at the location of the site.
- B [6] The plaintiff's patrol contractor had warned the defendant's representative, his agent or subcontractor numerous times that there is a 33kV cable at the construction site or within a radius of less than 50 meters thereof. This warning was given orally and by way of a notice which was accepted by the defendant's contractor or subcontractor.
- C [7] On the 24 February 2006, while carrying out the piling of sheet piles, the defendant through its agent or employees or representatives had willfully or negligently damaged the plaintiff's 33kV cable located between PMU New Subang Jaya and PPU Subang Jaya Town Centre, near the Mesiniaga building.
- D [8] Repair and relocation works were carried out by the vendors of Tenaga Nasional Bhd ('TNB').
- E [9] The decision to relocate the 33kV cable was made after the damage has been done to the 33kV cable and the repair and relocation works completed on the 1 March 2006. As a result of the damage to the 33kV cable the plaintiff suffered losses.
- F THE DEFENDANT'S CASE
- [10] The defendant alleged that the damage occurred at coordinates N: 10105.856 E:-12179.02 CH2135.783 (point of damage).
- G [11] On 31 July 2003, MSZ distributed 'Pelan Kedudukan Jalanan Bawah Tanah No: E 0222/UT/01-14' to all utility companies including TNB's subsidiary, Tenaga Nasional Distribution Sdn Bhd ('TN Distribution') to work out the existing underground services, in order for these utility companies to make the necessary arrangements to relocate the same where necessary and for
- H the defendant to avoid damage there to during the construction works.
- [12] TN Distribution was in charge of this project and at all material time the defendant was dealing with TN Distribution.
- I [13] On 13 November 2002, TN Distribution returned the duly approved Plan No E0222/UT/01-14 which was marked with the route of the 33kV cable. This approved plan did not indicate the presence of any 33kV cable at the point of damage.

[14] In response to the said letter, MSZ in their letter dated 28 January 2004, submitted 'Proposed Relocation of Existing TNB 11kV Cables and Standard Details Drawing' and 'Proposed Relocation of Existing TNB 33Kv cables and Standard Details Drawing' to TN Distribution for their urgent comments and approval and marked on the said plan, the route of the 11kV and 33kV cables that are to be relocated. This MSZ's drawings were drawn in complete reliance upon TNB's specification in the approved plan.

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[15] The construction work was carried out by the plaintiff in complete reliance on the approved plan.

C

[16] On 24 February 2006, while doing the piling of sheet piles, the defendant's subcontractor had damaged the 33kV cable at the coordinate N: 10105.856 E:-12179.02 CH2135.783.

D

[17] After the incident, it was discovered through TNB's officer, Azani bin Chaari that the 33kV cable was probably not marked on the approved plan as the cable was merely for back up supply.

[18] The defendant denies any negligence on its part for the damage caused to the 33kV cable.

E

THE LAW ON NEGLIGENCE

[19] It was submitted by the plaintiff that in order to show that the defendant was negligent and thereby liable for the plaintiff's losses, four requirements of negligence has to be proven by the plaintiff. The plaintiff refers to the case *Teoh Meng Keat and Anor v Penny Ann Monomony Dawson* [2011] 1 LNS 251 and the case of *Wu Siew Ying v Gunung Tunggal Quarry and Construction Sdn Bhd & Ors* [1999] 4 MLJ 9; [1999] 4 CLJ 339, where it is stated that, a defendant can be held liable in negligence if:

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- (a) there exists a duty of care situation between the plaintiff and the defendant;
- (b) the defendant had breached that duty ie the careless behaviour by the defendant in failing to measure up to the standard and scope set by the law;
- (c) it was foreseeable that such a conduct would have inflicted on the particular plaintiff the damage of which he complains; and
- (d) the defendant's alleged careless conduct caused the damage.

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[20] The defendant does not dispute the principles of law cited by the

A plaintiff above. The defendant also accepts that there was sufficient proximity in the circumstances of this case to impose a duty of care on the defendant for works carried out by the defendant.

B [21] The damage to the 33kV cable at the point of damage however was not caused by works carried out by the defendant but by the sheet piling works done by its subcontractor, Giga Engineering Sdn Bhd.

THE ISSUES

C [22] At the trial, the court was informed that the only issue for determination is whether the defendant had knowledge of the presence or existence of the 33kV cable at the damage point. Whether the defendant had discharged its duty of care to the plaintiff.

D [23] It was not disputed that the damage had occurred at coordinates N: 10105.856 E:-12179.02 CH2135.783.

THE ANALYSIS OF EVIDENCE AND FINDINGS

E [24] It is the plaintiff's pleaded case that the defendant had knowledge of the existence of 33kV cable at the point of damage when the site visit was done in 2004 between PW1 and DW5 and the route of the 33kV cables were shown to DW5.

F [25] The plaintiff further states that while the construction was carried out after several meetings were held and site visits were done, the defendant was told the presence of the 33kV cable.

G [26] Subsequently, the plaintiff's patrol contractor had warned the defendant's representative, his agent or his subcontractor numerous time that there is a 33kV cable at the construction site within a radius of less than 50 meters. The warning was given orally and by way of a written notice which was accepted by the defendant's contractor or subcontractor.

H [27] The defendant denies that they had knowledge to the presence or existence at 33kV cable at the damage point.

I [28] The defendant submits that the plaintiff or its subsidiary, TN Distribution had not marked or indicated the location of any 33kV cable at coordinates N: 10105.856 E:-12179.02 CH2135.783 (the damage point) on their approved plan ie *Pelan Kedudukan Jalinan Bawah Tanah* No E0222/UT/01-14.

[29] PW1 testified that he had marked the route of the cable 33kV at the point of damage on the plan. The plaintiff claims that they have marked the route of 33kV cable in the plan. The burden therefore is on the plaintiff to prove that by producing a copy of that plan at the trial. The plan was never produced by the plaintiff at the trial. In fact the plaintiff failed to produce a single plan or drawing that showed the existence of the 33kV cable at the point of damage.

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B

[30] The Court of Appeal in the case of *Juahir bin Sadikon v Perbadanan Kemajuan Ekonomi Negeri Johor* [1996] 3 MLJ 627; [1996] 4 CLJ 1 held as follows:

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He who alleges must prove such allegation and the onus is on the appellant to do so. See s 103 of the Evidence Act. Thus, it is incumbent upon the appellant to produce Tan Sri Basir as his witness to prove the allegation. The fact that the appellant was unable to secure the attendance of Tan Sri Basir as a witness does not shift the burden to the respondent to produce the witness and testify as to what he had uttered, as firstly, the respondent never raised such an allegation, and, secondly, has denied even making one. For this very reason, the adverse inference under s 114(g) of the Act relied upon by the appellant cannot be accepted as establishing that if the witness had been produced, his evidence would work against the respondent. There is no obligation in law for the respondent to produce the witness as that obligation rests with the appellant, the party who alleges, and the fact that the appellant was unable to do so is fatal to his case. For this very reason too, the adverse inference under s 114(g) is invoked against the appellant.

D

E

[31] In the light of the authorities above, the court finds that since it is the plaintiff who has alleges that PW1 had marked the route of the 33Kv cable at the point of damage on the plan alleged by PW1 that he had marked it; it is thus incumbent upon the plaintiff to produce the said plan. The plaintiff fails to do so.

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[32] It is clear that the plaintiff owed a duty to dispel the allegation that he did the marking on the plan, by producing the said plan. By not doing so, this court must invoke s 114(g) of the Evidence Act 1950 against the plaintiff and hold that if the plaintiff had produced the said plan which PW1 alleged he had marked the route of 33kV cable at the point of damage; his evidence would have been unfavorable to the plaintiff.

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[33] On the contrary, all the drawings produced at the trial (bundle C at p 77 which is the same plan as in bundle E at p 65) did not show the presence or existence of the 33kV cable at the point of damage.

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[34] The construction drawing at bundle C p 25 on the 'Existing TNB 33kv Cable' and this drawing were prepared by Ram Kumar of MSZ based upon the

- A plan that was returned by the TN Distribution and his site visit with PW1. I notice that there is no marking of the 33kV cable at the point of damage. The plaintiff had admitted the authenticity and accuracy of the construction plan. The plaintiff has categorised the construction drawing as Part A of the common bundle of documents meaning that the contents were admitted.
- B Thus, the contents of the construction drawing are the evidence accepted by this court. There was no 33kV cable marked at the point of damage.

- C [35] By a letter dated 28 January 2004 (bundle C p 30) MSZ had forwarded to TN Distribution two sets of preliminary drawings for proposed relocation of the existing 33kV cable. This preliminary drawing (bundle C p 77) had also marked the existing route of the 33kV cable.

- D [36] Section 3.2.6 of the *Garis Panduan* (bundle C p 15) provides that TN Distribution have to check and verify the preliminary drawing and to mark accurately the route of 33kV cable. It is an undisputed fact that route of the 33kV cable was not marked at the point of damage. Point of damage was marked as 'PD' on the preliminary drawing (bundle C p 77 and bundle C p 65) by PW1.

- E [37] TN Distribution did not amend the preliminary drawing. There was no amended preliminary drawing returned to MSZ. PW2 had admitted in his evidence that it was common practice that in the event there was any errors on the preliminary or construction drawings that were prepared by MSZ, TN Distribution would correct it by amending them and returned them to MSZ.
- F

- G [38] The plaintiff neither amended the preliminary drawings nor returned it to MSZ with any amendments. Hence, I conclude that the preliminary drawing at bundle C p 77 and bundle E p 65 was approved by the plaintiff.

- H [39] There was no iota evidence that the route of 33kV cable was marked at the point of damage. On the contrary, all the contemporaneous documentary evidence show that all the drawings were not marked with the route of the 33kV cable at point of damage.

- I [40] The preliminary drawing was not amended by marking the route of the 33kV cable at the point of damage and returned the duly amended copies to MSZ. The plaintiff or TN Distribution never notifies MSZ or the defendant that the preliminary and construction drawings were inaccurate.

- [41] Thus, I am satisfied that based on the defendant's evidence and the contemporaneous documentary evidence; there is clear evidence that the plaintiff or TN Distribution did not mark the route of the 33kV cable at the point of damage.

[42] I will now deal with the issue whether the plaintiff or its agent or servant had informed the defendant of the presence of the 33kV cable before work commenced at the location. A

[43] The plaintiff submits that they did give oral and written notice about the presence of the 33kV cable before and at the time of the construction of the project. B

ORAL NOTICE

[44] It is pertinent to note that on the issue of the oral notification given by the plaintiff that it was the pleaded case of the plaintiff had given oral notice to the defendant on the presence or existence of the 33Kv cable located at the construction site. C

[45] PW1 is the crucial witness for the plaintiff's case. In his testimony PW1 testifies that: D

- (a) he informed the defendant's representative the location of the 33kV cable; E
- (b) on 14 April 2004, he showed the 33kV cable to Ram Kumar from MSZ ie the representative of the defendant;
- (c) on the same day he did marked the location of the 33kV cables on the plans and returned it to the defendant; F
- (d) the defendant knew the existence of 33kV cable because the trial hole was done in 2002;
- (e) an oral warning was given to the defendant as to the existence of the 33kV cables near to the defendant's project construction site; and G
- (f) the plaintiff had informed the defendant the location of the 33kV cables in several meetings and discussion held between them.

[46] Based on the evidence of the plaintiff, I conclude that the plaintiff did give oral notice to the defendant but never notify the defendant the presence or existence of 33kV cable at the point of damage — ie point 'PD' marked by PW1 bundle C p 77 and bundle E p 65 or at the coordinate N:10105.856 E:-12179.02 CH2135.783. H
I

TRIAL HOLES

[47] There was no evidence before this court that the trial holes were dug at

A the point of damage to ascertain the presence of the 33kV cable.

WRITTEN NOTICE

B [48] In para 10 of the re-amended statement of claim, the plaintiff pleads that ‘... Kontraktor Peronda Plaintiff telah memberi amaran berkali-kali pada wakil Defendan ... bahawa terdapat kabel 33kV di tempat pembinaan atau dalam radius kurang dari 50 meter dari laluan kabel tersebut. Amaran ini diberi dalam bentuk lisan dan bertulis yang telah diterima oleh kontraktor atau sub-kontraktor Defendan’.

C [49] The plaintiff relied on the evidence of PW1. In evidence PW1 referred to the notice at bundle C p 57 as a written notice given by the plaintiff to the defendant.

D [50] PW1 conceded in the cross-examination that unless the written notice contained the precise co ordinates for the location of the 33kV cable that was damaged, it was of no use as the party receiving the written notice from the defendant would not be able to determine the precise location of the 33kV cable. The defendant would continue to rely on the construction drawing for the location of the 33kV cable.

E [51] It was further agreed by PW1 that there was no iota of evidence stated in the written notice given to the defendant, the presence of the 33kV cable at the place of incident or damage point.

F [52] PW1 went on to admit that the written notice at bundle C p 57 referred to 33kV cable in SS12 in Subang Jaya. The incident and the point of damage were in SS16, which was far more than 50 meters from SS12.

G [53] From the evidence of the plaintiff’s own witness, confirms that there was no written notice given by the plaintiff to the defendant for the existence of the 33kV cable at the point of damage.

H [54] It was also submitted by the plaintiff that the plaintiff relies on s 41 of the Electricity Supply Act 1990 (‘the said Act’) where the defendant is strictly liable to pay the plaintiff compensation for the damage caused to the 33kV cable.

I [55] For ease of reference, s 41 of the said Act is reproduced below:

- (1) Any person who removes, destroys or damages whether willfully or otherwise, any installation or any part thereof, or any public lamp or any post, bracket or other means of support of a public lamp, or any

instrument used in connection with any installation for recording the output or consumption of electricity, shall, in addition to any penalty to which he may be liable under this Act, be liable to pay full compensation for the damage he has done and the compensation shall be recoverable by civil action or suit before any court.

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[56] The plaintiff submitted that, this section imposes a strict liability on anyone who causes damage to any installation belonging to the plaintiff regardless of whether the damage was done willfully or otherwise. The plaintiff refers to the case of *Tenaga Nasional Berhad v Trans Resources Corp Sdn Bhd & Anor* [2009] 5 MLJ 673; [2009] 1 LNS 516.

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[57] Whether s 41 of the said Act applies to the defendant?

[58] PW1, PW2 and DW1 testified that the damage to 33kv cable was caused by the sheet piling work undertaken by the defendant's subcontractor, Giga Engineering Sdn Bhd and not the defendant.

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[59] What is clear from the evidence of the plaintiff is that the plaintiff had actual knowledge that the sheet piling work was undertaken by the defendant's sub contractor, Giga Engineering Sdn Bhd and not the defendant.

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[60] It was not pleaded that the defendant is vicariously liable for the acts or omissions of its subcontractor. Thus, pursuant to s 41 of the said Act, the person who damages any installation shall be liable to pay full compensation for the damage he has done.

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[61] The provision places strict liability on the party who damaged the installation. It is evident that Giga Engineering Sdn Bhd who damaged the 33kV cable at the damage point and not the defendant.

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[62] The plaintiff is not entitled to claim for any compensation for the damage caused to the 33kV cable under s 41 of the said Act. TN Distribution is not a party to this suit. Hence, from the evidence adduced Giga Engineering Sdn Bhd is strictly liable to pay compensation for the damage cause to the 33kV cable.

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[63] The plaintiff also pleaded and relies on the maxim of *res ipsa loquitor*. The plaintiff submitted that the defendant had control over the location of the site at material time. The defendant had conducted the trial hole at the place of incident and knew the presence of 33kV cable as early as 2002. Therefore it is not possible for the plaintiff who has no control of the site to explain and prove

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A precisely the cause of the damage. The defendant bears the burden to show that the defendant was not negligent in carrying out the sheet piling work.

[64] In *Teoh Guat Looi v Ng Hong Guan* [1998] 4 MLJ 525; [1998] 4 CLJ 416, His Lordship NH Chan has explained the principle of *res ipsa loquitor* in the following terms:

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... *res ipsa loquitor* was in essence no more than a common sense approach to the effect of the evidence in certain circumstances. It means that a plaintiff prima facie establishes negligence where (i) it is not possible for him to prove precisely how the accident happened but (ii) on the evidence as it stands, he manages to show that the accident could not have happened without the negligence on the part of the defendant

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D [65] There is no evidence that the defendant had sole control over the location of the site. The evidence shows that the defendant's subcontractor, Giga Engineering Sdn Bhd also had control over the location of the site.

E [66] Therefore, the incident itself is not sufficient evidence of negligence on the part of the defendant. The cause of event leading to the damage was not only under the control of the defendant but also Giga Engineering Sdn Bhd.

F [67] The defendant had shown how the damage had occurred. The defendant did not cause the damage. The defendant clearly shown that the damage was caused by sheet piling works undertaken by Giga Engineering Sdn Bhd and not the defendant. The incident was not caused by negligence on part of the defendant. In the circumstances, I am of the view that the maxim of *res ipsa loquitor* does not apply in this case.

G [68] The defendant submitted that the plaintiff does not have the locus standi to bring this suit against the defendant because the TN Distribution is a separate entity from the plaintiff and the damage to 33kV cable was caused by Giga Engineering Sdn Bhd while undertaking the sheet piling works.

H [69] On this issue, the plaintiff submitted that this issue is a material issue and should be pleaded by the defendant in his defence. Failure to do so should necessarily result in the evidence or submissions on the issue not pleaded to be disregarded on arriving at a decision. It is trite law that parties are bound by their pleading.

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[70] It is trite that when the plaintiff is bringing the action, it must surely be obvious that the plaintiff must first determine who the opponent party to his action is. Once it is determined, then only the plaintiff can file its claim. One needs a valid cause of action to form the basis of lawsuits.

[71] Although the issue of locus standi was not pleaded, there is no prejudice and surprise caused to the plaintiff. I have to disagree with the plaintiff's contention on this issue. At the end of the trial, the court finds that the plaintiff has wrongly sued the defendant, therefore the plaintiff's claim cannot be allowed by the court.

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[72] As such it is my view that the plaintiff does not have the locus standi to bring this suit against the defendant because the TN Distribution is a separate entity from the plaintiff and the damage to 33kV cable was caused by Giga Engineering Sdn Bhd while undertaking the sheet piling works.

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[73] Given all the above, I find that the plaintiff has failed to prove that the damage to the 33kV cable at the damage point was not caused by the defendant's negligence. I further find that the defendant had not breach any duty of care owed to the plaintiff. That being the case, the negligence of the defendant was not proven on the balance of probabilities.

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[74] As such the plaintiff is not entitled to any damages for the losses suffered by them. Based on the above, the plaintiff's claim is dismissed with costs. Costs of RM100,000 are to be paid by the plaintiff to the defendant.

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Plaintiff's claim dismissed with costs.

Reported by Kanesh Sundrum

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